United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7533

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRAVELERS INDEMNITY COMPANY,
Plaintiff-Appellee,

—against—

S. S. POLARLAND, her engines, boilers, etc.,
D/S A/S VESTLAND, RICH. AMLIE & Co. A/S,
& SEVEN SEAS SHIPPING CORP.,
Defendants.

S. S. POLARLAND,
Defendant-Appellee,

—against—

SEVEN SEAS SHIPPING CORP.,
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT SEVEN SEAS SHIPPING CORP.

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INDEX

Table of Authorities

Cases:

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General

The issues presented for review to this Court are based on the contentions of appellant, Seven Seas Shipping Corp. ("Seven Seas"), that critical findings of fact by the Court below were clearly erroneous; that appellee Travelers Indemnity Company ("Travelers") failed to meet its burden of proof sufficient to support the judgment in its favor; and that the record below does not contain legally cog-

nizable support for Judge Weinfeld's decision. As such, the errors of Judge Weinfeld set forth in Seven Seas main brief are not immune under Fed. R. Civ. P. 52(a) from reversal by this Court.[1] The meaning of the documents on which Judge Weinfeld and appellees place great emphasis clearly are subject to independent review by this Court; contract interpretation and the inferences to be drawn therefrom are matters of law, *e.g., Teamsters Local 688* v. *Crown Cork & Seal Co., Inc.,* 488 F.2d 728, 740 (8th Cir. 1973); *University Hills, Inc.* v. *Patton,* 427 F.2d 1094, 1099 (6th Cir. 1970). Thus, this Court can determine whether or not the undated and incomplete document between Seven Seas and its affiliate Nimpex International, Inc. ("Nimpex"), the original plaintiff herein, in the form of a "booking note" ("Seven Seas/Nimpex Agreement") is or is not an enforceable agreement, and in doing so this Court can evaluate the unquestioned conduct of Seven Seas and Nimpex which was totally at variance with the terms of such agreement.[2]

We submit that the findings of the Court below were clearly erroneous and that there must be a reversal.

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[1] Rule 52(a) clearly is inapplicable to issues of law. *In re Joseph Kanner Hat Co., Inc.,* 482 F.2d 937, 939 (2d Cir. 1973). To the extent that Judge Weinfeld found that Seven Seas was negligent in transporting the steel coils (assuming, *arguendo,* that it was the carrier of the cargo), this Circuit has held that it can independently review this issue without reference to the "clearly erroneous" conditions of Rule 52(a), *e.g., J. Gerber & Co.* v. *S.S. Sabine Howaldt,* 437 F.2d 580, 594 (2d Cir. 1971); *Mamiye Bros.* v. *Barber Steamship Lines, Inc.,* 360 F.2d 774, 776-78 (2d Cir.), *cert. denied,* 385 U.S. 835 (1966); *Ellerman Lines, Ltd.* v. *S.S. President Harding,* 288 F.2d 288, 291-92 (2d Cir. 1961).

[2] Seven Seas main brief in pages 18-20 notes that significant provisions of the Seven Seas/Nimpex Agreement which related to the tonnage shipped, time for payment of freight, freight rate, liability for cost of loading and stowing, and mandatory inclusion of terms of the booking note in bills of lading, were not followed.

POINT I

Seven Seas Was Neither Carrier Of The Cargo Nor Liable For Alleged Damages To The Cargo

Appellees erroneously stress two points in their effort to support a finding that Seven Seas was the "carrier" as defined in the Carriage of Goods by Sea Act, 46 U.S.C. §§1300 et seq. (1970) ("COGSA"), so as to impose the liabilities of a "carrier" upon Seven Seas pursuant to COGSA.

Appellees argue that Seven Seas held itself out as a carrier and point to the testimony of Captain Davy Jones in support thereof. The thrust of this argument is a pointed attempt to impress with the irrelevant; the general business of Seven Seas has no bearing with respect to the specific shipment in question since the overwhelming evidence demonstrates that Seven Seas was not a "carrier" with respect thereto.[3]

Secondly, appellees (in order to impose COGSA liability) attempt to substantiate in the record the finding of the Court below that Seven Seas entered into a contract of carriage with a shipper. They argue that Seven Seas issued the bills of lading which were signed: "World Shipping, Inc. as agent only by authority of the Master" because, they claim that the record supports the finding that World Shipping, Inc. ("World") was Seven Seas' agent. [The individual who signed on behalf

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[3] If appellees truly consider the general nature of Seven Seas' business to be significant, they ought to give equal weight to the fact that Ferrostaal A.G. ("Ferrostaal") was a time charterer, operator, and "carrier" as to the Polarland, having replaced Seven Seas as the charterer thereof immediately prior to the loading of the cargo which is the subject of this action.

of World was John Reynolds, a Seven Seas' employee, but significantly, this "Seven Seas' employee" did not identify himself as a Seven Seas employee or use Seven Seas' imprinted forms.] Apparently the theory is premised on the following assertions:

1. Seven Seas had an "agency agreement with World" (Travelers' brief, p. 9);

2. World "was Seven Seas general agent in Cleveland" and "acted as Seven Seas agent" (Polarland's brief, p. 19); and

3. The agreement between Ferrostaal and Seven Seas ("Ferrostaal/Seven Seas Agreement") provided that Seven Seas appoint its own agent at Cleveland (592a).[4]

Despite appellees' assertions, there was *no* testimony that Seven Seas had an "agency agreement" with World[5] or had retained World as its agent for the shipment in question. We submit that the only specific testimony was by Seven Seas' witness that World was the agent of Ferrostaal for this shipment (419a, 496a). Since the Court below saw fit to disregard this testimony, the *only* source of its determination was the Ferrostaal/Seven Seas Agreement. Paragraph 7 thereof provides that Seven Seas would *name* the agent but Ferrostaal would *pay* the bill.[6] Although Seven Seas obtained the right to designate a

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[4] References to the joint appendix are cited "___a."

[5] The sole testimony concerning Seven Seas' relationship with World was that Seven Seas used World in Cleveland (where World held itself out as a general agent for any entity) when it had occasion to use an agent in that port (496a).

[6] Both appellees successfully avoided including reference to this portion of Paragraph 7 in their briefs. The reason therefor appears obvious.

most responsible agent to handle the port movement, it never, in any document, assumed any greater rights or obligations with respect thereto. We suggest that Ferrostaal's retention of the obligation to pay for World underscores the fact that World was Ferrostaal's agent. The finding of the Court below that World was Seven Seas' agent is clearly erroneous and should be reversed.

POINT II

The Plaintiff Failed To Establish That It Was Damaged

In retrospect, the most clearly erroneous finding by the Court below was its unequivocal determination that the damage occurred during loading despite the unquestioned primary facts that the shipper (Travelers' predecessor in interest, Nimpex) and the consignee were totally aware that the cargo was in a damaged condition when loaded on board the Polarland in Cleveland in May, 1970 and that Travelers' expert (the surveyor) *testified* he didn't know where the cargo was damaged:

> "Q. Are you sitting there telling us that you can tell that it was the last time that it was handled that it was damaged and not the first or the second time?
>
> A. When I understand that the happening, that is, bringing the merchandise to the pier and from the pier bring it on board the ship; that's what I am referring to.
>
> Q. I am referring to the two definitely, and possibly three times, it was handled before you saw it in Belgium.
>
> It was handled once at the factory; it was handled again at the terminal, the marine terminal; and then it was loaded on the ship; so it was handled at least two and probably three times.

A. Well, of course I am excluding the factory because, as a matter of principal, I assumed that in the factory they would handle the merchandise carefully.

Q. The fact of the matter is, though, you don't know when the handling damage that you observed occurred, do you?

A. *Absolutely not, and I did not say when this occurred.*" (157a) (Emphasis supplied.)

* * * *

"Q. That's the allowance.

A. Yes.

THE COURT: For what?

A. The mechanical damage due to handling.

Q. $19,000?

A. $19,862.13.

Q. *That's the damage that you don't know when that damage occurred, is that correct?*

A. That's right." (162a) (Emphasis supplied.)

The Peachman survey stated:

"Each of these coils was fitted with four core-straps and two girth-straps and it was noted that one or more of these straps on some of the coils, had become broken from previous handling. All of the coils of the Hot Rolled steel were rusted in an overall condition, and old and dried water courses were found in the bottom sections and extended for the full width of the core laps. In addition, the majority of the coils were telescoped from 0" to 2", and many of them had their outer laps and edges chain-scored and the core-laps bent due to previous handling. The coils of the Cold Rolled steel all showed a distortion in way of the core and top edge protection, due to previous handling, and the covers were lightly to moderately rusted overall." (772a)[7]

[7] Travelers' brief criticizes appellant's interpretation of this passage but did not see fit to reprint the same. Accordingly, the entire text is set out for this Court's review.

The Court even noted the lack of proof in this regard when it stated:

> THE COURT: Of course, there is no proof that that condition was there at the time of loading, but he's assuming a state of facts as to which no proof has been offered as yet, and I am aware of that.
>
> So, bear that in mind, counsellor. I am aware there is no proof of the condition in which they were found upon the outturn, with the condition on which they were placed on board the vessel." (217a)

It is submitted that the missing proof was never supplied.

That the consignee knew that the coils were damaged preloading is clear from the fact that it amended the letter of credit to read as follows:

> "We beg to inform you that our client
> FABRIQUE DE FER S.A.
> 59 Maubeuge
>
> asks us to advise you that the above credit is amended as follows:
>
> —the bills of lading may be annotated: "outer wrappers atmospherically rust stained" and "slightly damaged—" "some bands broken and/or missing." (771a)

Claude Franquet, the general manager of the consignee, testified that the consignee knew it would have to make claim for preloading damage.

> "Q. Mr. Franquet, there came a time in the transaction when you received the bills of lading, which have been marked Exhibits 4, 5 and 6, did there not?
>
> A. I received copies.

Q. And did the copies contain the notation 'Outer wrappers atmospherically rust-stained'?

A. Yes, sir. Here they are. (Indicating).

Q. When you noticed those reservations on the bills of lading, did you consider the bills of lading to be in accordance with the terms of your letter of credit?

A. With regard to the first items here, 'Outer wrappers atmospherically rust-stained, outer wrappers slightly damaged', it was all right, they said, but for the last one they knew they would have some damage and they would have to claim.

Q. Did you authorize your bank under letters of credit to pay for damaged material?

A. Yes." (316-17a)

Appellees seek to obfuscate the documentation of damage at the time the coils were loaded. The face of the dock receipts which note damage to only 26 coils represent only a part of the documents existing at the time of the shipment. The related receiving records coupled with the other documents in existence at the time of the shipment, including the mates receipts (outward cargo manifest) analyzed in Addendum B to appellants main brief, clearly illustrate the significant number of coils damaged at the time of loading.[8]

Travelers attempts to support Judge Weinfeld's sole reliance on the surveyor's calculation of damages by the simplistic statement on page 18 of its brief: "A surveyor's

[8] Although appellant considers that the "chaffing" of a wrapper necessarily means that the coil is chaffed—particularly when coupled with mates receipt notations of "edges broken and bend [sic]", to avoid any question of the type of damage, we annex a revised Addendum A. We note that Travelers harsh language does not disguise the fact that it is unable to overcome Seven Seas' analysis of the *number* of coils damaged, only questioning the *description* in the record of such damage.

estimate is sufficient to establish the extent of cargo damages." Such reliance is hardly justified where the surveyor had no independent knowledge of the value of steel at the time he calculated damages (141a); with respect to the damaged steel on which an allowance was made, had no knowledge of the use, total or partial, made by the consignee of these coils (167a); and with respect to the rejected steel, made no effort to evaluate the depreciated value thereof but merely sold it when the consignee rejected the same without the consignee offering any reason therefor (225-226a). The conclusion is inescapable; the consignee rejected high priced steel in a falling market,[9] so that it could replace the same at lower prices and Mr. Heureux, the surveyor, did nothing to minimize or limit such conduct.

POINT III

The Polarland Was Not Entitled To Recover Legal Fees From Seven Seas

The substance of the Polarland's argument apparently is that in every case in which a vessel is cast in "in rem" liability, the vessel is entitled to recovery. We submit that an independent evaluation of the equitable considerations present must be made in every case before legal fees can be awarded, considerations not here present.[10]

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[9] 141 a.

[10] It should be noted that if damage occurred during the loading process the Polarland crew was involved therewith. The Peachman report states, after describing how the coils were laid, ". . . the cargo was secured by means of blocking, shoring and lashing, with cables and turnbuckles, all to the satisfaction of the vessel's command." 772 a.

Conclusion

For the reasons stated above and in Seven Seas main brief, we urge that the judgment should be reversed in all respects.

Respectfully submitted,

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ADDENDUM A

Steel Coils—Damage Notations
(Information extracted from Plaintiff's
Exhibit 18, 605a-712a)

Definitions:

Coil Wrappings Chaffed ("C")
Coil Wrappings Rusty ("R")
Contents Unknown ("CU")
Dock Receipt ("DR")
Receiving Record ("RR")

Railroad Car No.	*No. of Coils*	*Type of Damage Notation*	*Where Noted (Source)*
PC 752732	10	R, C, CU	DR
EL 15921	8	R, C, CU	RR
EL 9039	8	R, C, CU,	RR
		"Clause" *	DR
EL 15926	9	R, C, CU	RR
EL 9038	8	R, C, CU	RR
		Clause	DR
EL 17712	8	R, C, CU	RR
		Clause	DR
EL 9100	8	R, C, CU	RR
		Clause	DR
EL 17763	8	R, C, CU	RR
EL 15909	9	R, C, CU	RR
		Clause	DR
EL 9063	10	R, C, CU	RR
EL 15942	10	R, C, CU	RR
		Clause	DR
EL 9047	8	R, C, CU	RR
EL 9084	10	R, C, CU	RR

* The term "Clause" is hardly unknown to the trade. Plaintiff's own expert agreed that it is a short-hand way of stating that the bills of lading noted damage (184a-185a).

ADDENDUM A—(Cont'd)

Railroad Car No.	*No. of Coils*	*Type of Damage Notation*	*Where Noted (Source)*
EL 9024	8	R, C, CU	RR
EL 9026	8	R	RR
EL 9022	10	R	RR
		Clause	DR
EL 15999	6	R	RR
EL 15902	8	R	RR
		Clause	DR
EL 15932	10	R (6 "slight" 4 "heavy")	
EL 15929	8	R (7 "heavy" 1 "slight")	RR
EL 9043	8	None	
CTO 306302	11	Clause	DR
EL 9021	8	R	RR
EL 15910	8	R	RR
		Clause	DR
EL 15972	6	Rust	RR
		Clause	DR
EL 15995	6	R	RR
		Clause	DR
EL 15936	10	R, C, CU	RR
PER 387050	8	R (Paper covering torn	RR
		Uncovered car)	DR
PER 387151	8	"S/R, P/CT, OTC"	DR
		R	RR
PC 600530	7	R	RR
RDG 34127	8	R	RR
		Clause	DR
RDG 34017	8	R	RR
		Clause	DR
PRR 385413	8	R	RR
PRR 377217	8	R	RR
P&G 36723	8	R	RR
PC 601227	7	R	RR

Coils Wrappings Chaffed=136

Service of two (2) copies of

the within Reply Brief is hereby admitted this

16th day of May, 1977

Attorney for POLARLAND

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the within Reply Brief is hereby admitted this

16th day of May, 1977

Attorney for